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From: "BEEDLE, Ralph" <rb@nei.org>
To: "'mtl@nrc.gov'" <mtl@nrc.gov>
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Subject: Industry Comments - Enforcement Program

January 28, 2002

Mr. Michael T. Lesar
Chief, Rules and Directives Branch
Office of Administration
U.S. Nuclear Regulatory Commission
Mail Stop T-6 D59
Washington, DC 20555-0001

SUBJECT: Request for Comment on Use of Alternative Dispute Resolution in the NRC's Enforcement Program

Dear Mr. Lesar:

On behalf of the commercial nuclear energy industry, the Nuclear Energy Institute submits the following comments for the NRC's consideration as it evaluates the use of Alternative Dispute Resolution (ADR) in the NRC's Enforcement Program. See 66 Fed. Reg. 64890; December 14, 2002.

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If you have any questions regarding the industry's position, please contact Ellen Ginsberg, Deputy General Counsel, at 202-739-8140 or me.

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NUCLEAR ENERGY INSTITUTE

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The objectives of a quicker and more efficient path to resolving issues, more effective results, and improved relationships among the agency and the party or parties are laudable public policy goals. The agency should consider all practical steps to achieve them. The Administrative Disputes Act of 1996 was enacted to encourage federal agencies to implement ADR programs to assist parties in resolving disputes. Further, several other federal agencies already provide for ADR as part of their enforcement and adjudicative processes and we understand their experiences with ADR generally have been positive. Thus, it is worthwhile for the NRC to evaluate alternative means of resolving various kinds of issues subject to enforcement actions.

Conceptually, ADR has considerable allure. ADR has the potential to increase the efficiency with which disputes are resolved, and thereby minimize both the time and the need for a large staff and resource commitment to resolve issues. Because ADR was developed to be a less adversarial and less formal forum for communication than traditional adjudicative or administrative processes, it can promote greater cooperation among the parties. Effective ADR regimes actually

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allow parties to have greater control over their conflicts by permitting them to take increased responsibility for the development of the process as well as the ultimate outcome of that process. Also, by fostering earlier and more direct communication, ADR may lead to more timely and better preventive and corrective action in those cases in which such action is warranted.

ADR has two distinguishing characteristics—flexibility and confidentiality—both of which make ADR different from and an appealing alternative to litigation and other formal proceedings. Simplicity also should be a key objective in designing an ADR program (as well as fashioning an ADR process for a particular dispute). The very appeal of ADR is that it is supposed to be less cumbersome and rigid than litigation. In developing an ADR program, the agency should assiduously avoid over-proceduralizing and excessively limiting when and for what issues ADR may be invoked. Thus, the NRC should develop an ADR program that is available for use in almost all enforcement actions, can be initiated at various stages in the enforcement process, and can be customized to a limited extent to suit the circumstances.

The following two sections discuss the need and bases for developing an ADR program that incorporates the attributes of flexibility and confidentiality. The third section addresses the specific import of ADR in the context of enforcement action based on a discrimination claim.

Flexibility

Properly constructed, an ADR program can provide the parties with far greater control over their disputes, albeit typically with some oversight or participation by a neutral. The ability of the parties to exercise some greater control over the manner in which a dispute is resolved is particularly relevant to the question on which the NRC seeks public comment: Should the agency develop and implement an ADR program as part of its enforcement process? Predecisional Enforcement Conferences and Regulatory Conferences under the Reactor Oversight Program tend to be highly structured, resource-intensive and, frequently, adversarial. Although these meetings have been successful in some instances, in other instances any meaningful "exchange" of information is absent and, given the Enforcement Policy's flow path, the enforcement process lacks other opportunities for open and frank discussion. In other words, the parties to NRC enforcement conferences are not fully satisfied with *the process*, an issue wholly apart from the ultimate decision.

An ADR program could be structured to allow the parties to make certain choices regarding how the dispute is handled. For example, the parties should have the opportunity to request that ADR be initiated at various points in the process and

[1]Determinative ADR is typified by arbitration and charges the neutral with rendering a decision that is binding

should be able to request a particular ADR process to be used. (ADR processes generally are determinative or facilitative.)[1] Providing the parties with even a relatively limited opportunity to structure the process may well yield greater participation and increase the parties' sense of responsibility for the outcome.

In this regard, the agency should make available specific ADR options from which the parties can choose, such as binding arbitration, non-binding arbitration, and mediation to facilitate settlement. This will avoid the potential for parties to get bogged down by wrangling over details of the process to be used prior to addressing the issue on the merits. Procedures to be used under each process would be defined in advance. This approach would seem to provide sufficient flexibility for parties to select a process most appropriate to the circumstances while curtailing excessive dispute over details.

We would expect that any regulations issued by the agency would state that it intends to adopt or confirm the results of mediated settlement agreements or arbitration absent compelling evidence of fraud in procuring the decision or settlement, tainted neutrals, or clear errors of law. This action would provide participants with confidence in the ADR processes, encourage both licensees and the staff to make meaningful use of those processes, and reduce the likelihood of further proceedings following ADR. It would also memorialize the agency's interest in assuring that disputes resolved through ADR are not irreconcilable with the agency's statutory obligations. Obviously, if the NRC were able to reject out-of-hand ADR results with which it did not agree, the process might be viewed as futile and therefore not used by potential parties. The balance here is important: The agency must give the parties enough leeway to fashion their own solution and the agency must be prepared to accept it, even if the solution is not exactly what the agency might have chosen, *as long as the solution is not irreconcilable with the agency's statutory obligations.*[2] Otherwise, there will be little or no incentive for parties to use ADR.

In addition, parties could be permitted to choose a neutral from a list of qualified neutral third parties approved by the agency or developed through some other fair and efficient means. The pool of neutrals should not be limited to NRC personnel

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on the parties. Facilitative ADR, such as mediation, is designed to allow the neutral to assist the parties in reaching an agreement and is somewhat similar to that which takes place in settlement negotiations.

[2]The value of ADR is directly related to two additional aspects of current NRC enforcement practice. First, to the extent that ADR produces a partial resolution of issues potentially subject to enforcement action, that resolution should receive "settlement credit" in the broader context as provided for in the NRC's current Enforcement Policy. Second, early invocation of ADR should enable the NRC (and DOL) to conserve resources by deferring investigations in many if not all cases until the process had either produced a successful resolution of issues (thus obviating or at least narrowing any need for investigations) or failed, thus creating a need for more conventional pursuit of enforcement action.

such as Atomic Safety and Licensing Board members or NRC staff members not involved in the dispute subject to ADR. The NRC correctly observed in its Request for Comments "neutrals try to promote a candid and informal exchange regarding the events of concern, as well as about the parties' perceptions of and attitudes toward these events, and encourages parties to think constructively and creatively about ways in which their differences might be resolved."[3] In order to be successful, neutrals also must be capable of establishing an atmosphere of respect among the parties, establishing a sense of trustworthiness, and fostering participation by the parties. By permitting parties to choose the neutral, the ADR process can, from the outset, avoid issues of decision maker bias or even the perception of bias.

The NRC also should seriously consider developing a process that is sufficiently flexible to permit parties to request ADR at various points during the proceeding in question.[4] That having been said, the industry believes there will be particular benefit from ADR during the initial phases of the enforcement process. Early intervention is likely to prevent the agency and licensee (or, depending on the circumstances, other parties) from quickly becoming entrenched and unyielding in their views of the matter at issue. Use of a properly selected ADR process early on in a dispute can promote a more accommodating attitude by the parties and thereby minimize the tendency to galvanize positions prior to a full and open discourse of the issues. As is discussed in greater detail below, the opportunity for facilitated discussion among the parties is a particularly important feature (and an aspect of ADR) currently missing from the agency's handling of discrimination cases.

A potential benefit of ADR—establishing more open communication between parties to a dispute—also can be significant at later points in the enforcement process and should not be overlooked. In fact, some ADR techniques may be more effective depending on when in the process they are used. For example, appointment of a settlement judge might be more appropriate when a hearing is requested on a proposed civil penalty, than evaluation and facilitated dialogue by a trained Staff neutral, which might better serve the parties' interests when an apparent violation first is identified.

Participation in ADR should remain voluntary. Unless the parties agree otherwise, ADR should not preclude a party from exercising any other rights provided by statute or NRC regulation. We note in this regard, however, that statistics on ADR show non-binding arbitration with a right to trial *de novo* does not significantly decrease the average time or cost of obtaining a final resolution. In addition, as noted above, participation in binding arbitration should bind both the NRC and the

[3] See 66 Fed. Reg. 64892.

[4] Although these comments do not focus on the detailed mechanics of how particular aspects of an ADR process would be implemented, we would expect any ADR process to be accompanied by detailed guidance delineating how to initiate the process as well as how the process will progress once initiated.

party or parties. This would preclude any right of subsequent appeal or hearing except on narrow grounds.

ADR programs seem to be most effective when the ADR process can be tailored, to some greater or lesser extent, to the individual dispute. The agency could make available a variety of ADR process features and, with input from the facilitator or arbitrator, allow the parties to agree upon a process that best suits the particular circumstances.

Confidentiality

We agree with the NRC's broad statement that confidentiality will be a critical feature of a successful ADR program.[5] The NRC clearly recognizes the benefits of confidentiality in joint sessions of all the parties with the neutral, as well as in individual party-neutral sessions. The NRC makes the compelling statement that "...frank exchange may be achieved only if the participants know that what is said in the ADR process will not be used to their detriment in some later proceeding or in some other matter."[6] In fact, confidentiality is one of the most significant attributes differentiating ADR from other more formal administrative or adjudicative processes. To force ADR sessions to become public effectively would transform them into the very kind of proceedings to which ADR is intended to be an alternative.

We recognize that the public is likely to be concerned about the level of government accountability provided in an ADR process. We would expect the public to seek some assurance that the ADR process does not allow the parties to accede to some grave injustice or gross mistake. The answer to these concerns is that the issue of public accountability must be carefully weighed against the potential to significantly hamper the effectiveness of ADR through continuous public scrutiny. Here, the analogy to settlement negotiations is persuasive. The very same reasons settlement negotiations are not public support maintaining confidentiality for ADR sessions.

Although the NRC clearly recognizes the critical nature of confidentiality in ADR, the Federal Register notice also states "some ADR practitioners believe that mediation and other forms of ADR will work without confidentiality and that there is no need to preserve confidentiality in an ADR process."[7] The NRC discussion also states "mediation and other forms of ADR will work without confidentiality."[8] Support for this theory is based on there being no provision for confidentiality of statements or written comments by parties made during the joint session in the

[5] See 66 Fed. Reg. 64892.
[6] Id.
[7] Id.
[8] Id.

Alternative Disputes Resolution Act. The failure to provide for such confidentiality in the ADR Act should not be used by the agency as a prohibition on its discretion to construct a process that most effectively meets its needs and those of the agency's stakeholders.

ADR is not designed and cannot be expected to eliminate the possibility that interested persons will criticize the resolution of a particular case. No method of resolution, including administrative adjudication and traditional litigation, can assure interested parties or members of the public will be satisfied with the outcome. Detailed guidance on ADR (e.g., similar to the guidance on the conduct of hearings issued by the Commission to Atomic Safety and Licensing Boards in 1998) will eliminate any mystery regarding the actual implementation of ADR methods. For a particular case, the NRC could disclose the pendency of an enforcement action, the general basis for the action, the fact that the parties are pursuing ADR, and the terms of the resolution, if any, ultimately reached through ADR. Many ADR commentators agree that providing this information yields an appropriate balance between the public's interest in the proceeding and maintaining the integrity of the ADR.[9]

ADR in Discrimination Cases

The industry strongly believes there would be particular benefit from providing an opportunity to use ADR as an alternative to the current investigative/enforcement processes for discrimination allegations.

The current enforcement process simply does not work well for handling discrimination allegations. Under the current process, a panel typically screens allegations of discrimination and assigns them to NRC's Office of Investigations (OI) for investigation. As the industry and other stakeholders clearly and repeatedly have explained to the NRC Discrimination Task Group, OI's process is not an effective means of evaluating issues that are essentially employment based. OI investigation of discrimination allegations in the first instance seems to polarize the parties and often does not yield a fair result in a timely manner.

It is critically important to understand the nature of most discrimination claims as a conflict between a supervisor and worker in order to appreciate why various ADR techniques would more effectively serve the interests of all parties. Many allegations of unlawful discrimination occur because of some disagreement, miscommunication, loss of trust, or weakness in the supervisor-employee relationship. The circumstances in which these cases arise are largely subjective, often with behaviors on the part of both parties contributing to the breakdown.

[9] See e.g., The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice, 76 N.Y.U.L. Rev. 1768, 1805, December 2001.

OI's investigations are focused on wrongdoing, with the potential consequence of referral to the Department of Justice for criminal prosecution. The investigations yield little if any opportunity for those affected to review the facts and analysis or to provide additional information or perspectives. OI does not take any steps to facilitate a resolution between the parties. OI investigators tend to seek a definitive answer to whether a violation occurred and, by doing so, focus on reaching a determination regarding whether one party was right and the other party erred.[10] In fact, despite the sincerity of the alleger, most accused managers express bewilderment as to the bases for the accusation; they believe they were simply engaging in neutral management action. Perhaps most important, given the nature of the issues, OI investigations *do not promote resolution of the issues between the employer and the employee*. A less invasive approach, in which a neutral is perceived to be trustworthy and unbiased, would enhance the prospect of a mutually agreeable resolution. It may also lessen the potential for other employees to *perceive* a reluctance of co-workers to raise issues of concern.

In addition, OI investigations typically take many months, and sometimes years, to complete. While an OI investigation is pending, allegers often become frustrated, distrustful and disenchanted. During this period, the accused licensee and its personnel remain under a cloud of suspicion. As was vividly described to the Discrimination Task Group in presentations by several individual managers and counsel for managers accused of retaliation, the impact of an OI investigation on the accused manager is very likely to be devastating. These charges can effectively destroy the career of someone who, in most cases, firmly believes that he or she was properly doing his or her job.

Initiating OI investigations for discrimination claims also appears to reinforce the incorrect, yet common, expectation by workers that the NRC will somehow resolve (to the worker's satisfaction) the employment issues underlying the discrimination allegation. Even with NRC pamphlets, NRC Form 3, and verbal explanations by NRC personnel that the DOL is the proper forum for seeking personal remedies, many employees expect the NRC to affect the employee's relationship with the employer.

In contrast to OI's investigative process, DOL/OSHA's processes for evaluating discrimination allegations have many of the positive attributes offered through various ADR techniques. For example, OSHA conducts informal interviews, expects the parties to explain their relative positions early in the investigation and requires a relatively full exchange of documents. On-going, open discussions between the OSHA investigator and the respective parties are standard practice. OSHA investigations are to be performed in 30 days.

[10]The industry believes that the public interest would be better served by using ADR to refocus the inquiry on the cause of the breakdown in the employer-employee relationship and foster some agreement on mitigative action that might be taken.

In addition to the problems created by OI investigations, stakeholders have repeatedly expressed frustration at other aspects of the process. For example, issues are not brought before a neutral decision maker. Under the current process, the initial written response to the enforcement action does not reach an independent reviewing body. Rather, it goes to the same group that issued the action. Another problematic aspect of the current process is that it forces the licensee or individuals to invoke the administrative process after the enforcement action in order to seek impartial review. At this point, the parties are likely to have become extremely entrenched in their views and the process only permits one "winner." Regardless of which party "wins," that decision usually comes after the enforcement action has caused severe damage to each party's reputation.

ADR has particular promise for discrimination allegations because its use could alleviate, if not cure, many of the defects in the current process. First, some form of ADR should be available early in the process—i.e., before OI initiates an investigation. When ADR is conducted in the initial stages, provision should be made for the ADR process to involve the employee and the employer as the sole parties. At later stages in the process, if the dispute were not resolved, the agency could become a party to an ADR proceeding. At that point ADR still could be used to resolve, or at least narrow, the underlying factual dispute between employer and employee. If agreed to by the parties in advance, any successful reconciliation through ADR could eliminate the need for further action.

Second, use of ADR to resolve discrimination allegations would address the issues of impartiality so often of concern. Obtaining a neutral (from outside the agency) is likely to go a long way toward instilling confidence in the parties that the neutral is not biased. Both the employer and employee are more likely to believe the process was fair because a neutral is not already invested in the decision to proceed with enforcement action, as is now the case when the NRC conducts a Predecisional Enforcement Conference.

Third, the use of an ADR process designed to resolve disputes rather than find one party right and another wrong, may favorably influence the work environment at a licensed facility because discrimination cases will not gain the long-lived notoriety fostered by the current process. To the extent that early resolution of these cases reduces the likelihood of formal adjudication, there will be an enormous resource saving by the employer, employee and agency. This savings comes not only in the form of eliminating the need for large financial expenditures, but also in the form of higher worker morale and greater overall confidence in the NRC.

Fourth, for the reasons identified above, ADR should be considerably more efficient than the current enforcement process for discrimination cases. We would expect that discrimination cases resolved through ADR would consume less of all of the parties' time and resources, allowing the employee, management and the NRC to

devote their time and energy to maintaining safety. Efficiency could also be gained from potentially quicker implementation of corrective or preventive measures agreed upon through ADR.

In conclusion, the NRC should seriously consider developing an ADR program for use as part of the enforcement process. There is a particular *need* to offer ADR in discrimination cases and the industry strongly recommends that any ADR program not artificially exclude these cases or any other appropriate cases. The Commission should actively promote the use of ADR and should take steps to increase licensee confidence that it will provide a meaningful and fair option for resolution of disputes. No matter how well crafted ADR procedures may be, the benefits of ADR cannot be realized unless both the Staff and affected parties are willing to engage in the process.

We look forward to discussing development of an ADR program with the staff as it considers these and other responsive written comments. If you have any questions regarding the industry's position, please contact Ellen Ginsberg, Deputy General Counsel, at 202-739-8140 or me.

Sincerely,

Ralph E. Beedle

By E-Mail
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